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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 23

UNITED STATES OF AMERICA, ET AL.,
Appellants,

VERSUS

HENRY E. DRUM, ET AL.,
Appellees.

No. 24

REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellant,

VERSUS

HENRY E. DRUM, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF FOR HENRY E. DRUM, ET AL.

STATEMENT

These Appellees feel that the Court is entitled to a more definitive statement of the case than is contained in the brief of Appellants.

Oklahoma Furniture Manufacturing Company is incorporated under the laws of the State of Delaware, but its principal place of business and only plant are located at Guthrie, Oklahoma (Tr. 40). Appellee will hereafter be referred to as "Oklahoma." The individual appellees are all citizens and residents of the State of Oklahoma and of the Western District thereof. Where reference is made to these individuals as a group, "long haul drivers" will be used.

Oklahoma's primary business is the manufacturing of low cost furniture. This category of furniture is the most competitive of the industry (Tr. 40, 82). The price of the furniture and the delivery time are of prime importance. Oklahoma's customers are located in all states, but mostly in the states located east of the Rocky Mountains (Tr. 40). Oklahoma has always delivered the merchandise sold. There is no question, but that the Oklahoma's operation is interstate commerce, all parties agree that it is.

Likewise, there is no question but that this transportation of the furniture sold is an incident of the primary business of the Company. No identifiable charge is made for transportation (Tr. 92, 93). The furniture is sold at a price depending upon zones. The price within a zone depends upon competition (Tr. 83). In some instances, the prices are cheaper for more remote zones (Tr. 83). Another factor in computing zone prices is whether raw materials can be returned to the plant from the zone, with its resulting savings in expense (Tr. 84). The cost of transportation is treated as an element of production cost (Tr. 92).

The undesirability of this business to established carriers is attested by the fact that no individual carrier intervened in the "investigation" before the ICC or before the District Court. Oklahoma's products are light and bulky (Tr. 84). On isolated occasions the Company has shipped furniture by common carriage. The objections to this procedure are: (1) the furniture must be packaged or crated, (2) the carriage takes too long, (3) the cargo must often be transshipped, and (4) the transportation charges are passed along to the customer (Tr. 84, 85).

Objection (1) above is extremely important. The cost of crating furniture is constant and not dependent upon the value of the furniture crated. Expensive furniture may be crated for the same amount as inexpensive furniture. In the Company's case, the crating would be a large percentage of the value of the furniture and the Company could not remain competitive (Tr. 84, 93). The record indicates that only one carrier having authority to deal in uncrated furniture, services Guthrie, and this carrier goes only west (Tr. 93). Under Oklahoma's present operation, the furniture is transported in trailers specially designed for transporting furniture, and exclusively owned by the Company (Tr. 84). Padding is used rather than crating (Tr. 84, 93) and the Oklahoma is a self insurer of the cargo.

The equipment Oklahoma utilized for this transportation at the time of the hearing was 26 trailers, 17 tractors and two bob-tails (Tr. 76, 77). Initially, all equipment was owned by Oklahoma (Tr. 41). In the late 1930's and again in 1951, Oklahoma found that its drivers had been defrauding Oklahoma by padding gasoline tickets and through

misuse of other credit arrangements maintained by Oklahoma for the operation (Tr. 41, 81). At each occurrence, Oklahoma found that all but one driver had been guilty of breach of trust (Tr. 82).

In 1952, the Company decided to alter the existing operation to prevent future breaches of trust and the accompanying cost (Tr. 41, R. 67). Additionally, Oklahoma had been having bad experiences with accidents, exorbitant repair bills for minor repairs and keeping the equipment properly maintained (Tr. 42). In order to solve all of these practical problems Oklahoma decided to lease the tractor units from owner-drivers, paying rental by units of use, the owners to pay for the cost of oil and gas. If the driver paid the gasoline bills and maintenance costs, the Company would not be overcharged (Tr. 42). If the driver owned the equipment, he would be more careful to properly maintain it and see that it was not involved in accidents (Tr. 42).

A lease was drawn and submitted to the Interstate Commerce Commission representative in Oklahoma City, Oklahoma, who made suggestions and objections which were complied with (Tr. 92). Thereafter, this lease was put into effect between Oklahoma and approximately 14 owner-drivers. The lease arrangements provided only part of the tractors used; the remaining tractors were still owned by Oklahoma as well as all trailers and other equipment required for the operation.

The initial lease agreement, shown as Exhibit 3 (Tr. 114 to 119), was replaced in 1956 by a second lease agree-

ment. This second lease agreement is marked Exhibit 4 (Tr. 121 to 127).

Prior to July of 1957, the Supreme Court of Arkansas determined that the 1956 lease was illegal for operation in the State of Arkansas, and the Supreme Court of the United States denied *certiorari*. Thereupon and at the insistence of the Company a conference was held between Mr. R. H. Walker, the Company's managing officer, the Company's counsel, and the Bureau of Inquiry, and Compliance of the Interstate Commerce Commission at Fort Worth, Texas. At this conference the Bureau gave no specific suggestions, other than to state that since the drivers were not employees of the Company, then the Company did not have control over the tractors (Tr. 89, 90). Thereafter, in July of 1957, Oklahoma changed its method of operation. The present operation is reflected by the lease agreement put into effect in July of 1957, and also a contract with United Furniture Workers of America A.F.L.-C.I.O., Local No. 272. These two instruments define the present operation of the Company.

The following is a summary of the material provisions of the present lease agreement which is shown as Exhibit "2" (Tr. 109 to 113):

> The Company leases a tractor from the lessor, paying rental by unit of use. The lessor i paid 10 cents per mile for single axle pull, and 11 cents per mile for tandem trailer pull, with 3 cents additional for full loads on the back haul.
>
> The Company covenants that the tractor will be driven by an employee of the Company who is properly qualified and physically fit. The lessor pays the

cost of operation, including oil, gas, grease, and cost of parts, and also for Oklahoma commercial license plates.

The lessee agrees to maintain the vehicle at all times in first class operational condition and in compliance with state and federal regulations. The Company has the sole right of direction and use of the vehicle, and covenants that such use will be lawful, and that the tractor will be used in transporting only property belonging to the Company, and will not be subleased to any other person or corporation.

The lessor agrees to mortgage or encumber the vehicle only with the *written* consent of the Company. The Company is not responsible for wear, tear, depreciation, or loss to the leased equipment, and the lessor is not responsible to the Company for loss to Company's equipment or goods transported.

The Company carries public liability and property damage insurance upon the leased vehicle but does not carry collision, upset, fire, or theft insurance on the vehicle so leased. The lease is for a period of one year and is automatically renewed unless cancelled. The lease may be cancelled by either party upon thirty days' written notice and may be cancelled by the Company for breach on the part of the lessor.

On July 15, 1957, Oklahoma entered into a supplemental agreement to the existing contract with A.F.L.-C.I.O. United Furniture Workers of America, Local No. 272. The basic contract, which was plant-wide covering all employees, was dated December 14, 1956. The basic contract and the July 15th supplement are shown in Exhibit "5" (Tr. 128 to 143).

Under this union contract the long haul drivers received every benefit and Oklahoma incurred every obligation as was existing between Oklahoma and all of its plant employees. The following are either obligations of Oklahoma or benefits to the employee drivers under the union contract (which are not intended to be exclusive):

Oklahoma recognized the Union as the bargaining agency for the drivers and agreed to provide a check-off system for the payment of union dues. Oklahoma obligated itself on lay-offs and promotions to work on a seniority basis. Oklahoma agreed to fire a driver only for cause and, if requested, to furnish a written report of the reasons for action. Oklahoma obligated itself to provide a paid vacation for the drivers. The drivers received death benefits, military service benefits and leave of absence benefits.

The supplementary contract made the basic Union contract inapplicable to long haul drivers only where it did not fit the long haul driver's situation. This included maximum hours of work, minimum hours of work for vacation benefits, and pay per hour. Where the basic contract was amended provisions to achieve a like result were substituted.

In actual practice Oklahoma has always scrupulously followed its written agreements with the lessors. The I.C.C. has never contended that Oklahoma is guilty of subterfuge or evasion (Tr. 86). The I.C.C. has never suggested that Oklahoma has not provided all information required and all cooperation desired (Tr. 86, 87). The record conclusively shows this good faith.

The equipment and personnel used by Oklahoma for the transportation of furniture are a part of the Company's trucking department (Tr. 77), which is supervised by Mr. Barney Kennedy (Tr. 66). The personnel in the trucking department at the time of the hearing consisted of Mr. Kennedy, 17 drivers, and one inspection or truck man (Tr. 77, 66). The equipment consisted of 26 trailers, 11 leased tractors, 6 owned tractors, and 2 bob-tails (Tr. 77).

The drivers may be separated for discussion into two classes: (1) long haul drivers, and (2) short haul drivers. The long haul drivers are those who are by business practice assigned to the leased tractors and deliver to points more remote from Guthrie (Tr. 73, 74). The short haul drivers deliver to nearer points (Tr. 73). Both classes are paid according to the Union contract; 5 and 6 cents per mile for the long haul drivers, and $50.00 per week and 2 cents per mile for the short haul drivers (Exhibit "5", Tr. 128-143). The difference in the rate of pay arises from the fact that long haul drivers are able to amass a great deal of mileage during a week, but short haul drivers are not (Tr. 74). The short haul drivers were formerly paid only on a mileage basis (Tr. 63, 64), but the Company has changed the method of pay to provide adequate wages for the short haul drivers (Tr. 74).

Oklahoma exercises exactly the same control over the long haul and short haul drivers (Tr. 57, 58, 76). All drivers are given a route book showing the routes to be taken in making deliveries (Tr. 72). All drivers are instructed as to what to do in emergency situations (Tr. 51).

All drivers are required to undergo periodic physical examinations in compliance with I.C.C. regulations. All drivers are required to complete and give to Oklahoma drivers' logs and vehicle condition reports as required by the I.C.C. (Tr. 56, 94-98).

The Shipping Superintendent schedules all trips and all drivers receive assignments from him (Tr. 69). The assignments are brought to the attention of the drivers by a posting on a bulletin board (Tr. 49, 69) or by telephone or order of the superintendent. The trailers are loaded so that the last delivery to come off of the trailer is placed in the nose of the trailer (Tr. 71). In this manner, Oklahoma controls the order of towns to which deliveries are made (Tr. 71).

The assignments of drivers to particular tractors are done by the Trucking Superintendent. It is Company policy that one driver will be assigned to a particular tractor unless otherwise directed by the Superintendent (Tr. 75, 76, 82). This policy is because Oklahoma has found through experience that in this manner the equipment is treated better and there are fewer accidents (Tr. 70). This policy is subject to modification where business sense so dictates. Drivers are frequently interchanged by order of the Superintendent to where drivers of leased tractors drive other leased tractors or owned tactors and drivers of owned tractors drive other owned tractors or leased tractors (Tr. 58, 59, 61, 75). The long haul drivers recognize that they must drive the tractor assigned: "I'll drive anything out of there they will bill me on" (Tr. 65).

Where a short haul driver is assigned to drive a leased tractor, then he is paid the customary $50.00 per week and two cents a mile. The short haul driver must pay the gasoline and oil costs, but the lessor of the tractor reimburses him (Tr. 80). Where a long haul driver is assigned to drive a Company owned tractor, he is paid the customary 5 and 6 cents per mile.

Oklahoma deducts withholding tax from the wages of all drivers. Oklahoma withholds the employees' portion of social security tax and pays the employer's portion of social security tax for all drivers (Tr. 101). Oklahoma provides workman's compensation insurance for each driver (Tr. 101). Oklahoma provides and pays for all public liability (personal injury and property damage) insurance (Tr. 85). All drivers are allowed to use the tractors assigned to them for transportation between work and home (Tr. 60, 101). The full risk of loss to cargo is upon the Company; no driver signs for cargo.

Each driver is paid weekly for the previous week's wage. In the case of long haul drivers, they are paid weekly for the rental of the tractor according to the lease agreements. The checks for wages and rental are separate (Tr. 46, 64). The Union Contract is plant wide, but not a closed shop. Some long haul drivers are members of the Union (Tr. 48) and some are not (Tr. 54).

SUMMARY OF ARGUMENT

The District Court examined all the facts and circumstances surrounding the lease agreement, and the contract with the labor union together with the actual practices

thereunder. The District Court stated the basic issue to be: who is transporting the goods in question? The District Court answered that question by the two tests advanced by the Commission in its report. That court concluded that Oklahoma had the right to and did actually exercise direction, control and domination of the transportation of its products and the equipment and personnel concerned therewith, and; that the drivers in substance were not engaged in the business of for-hire transportation. Appellants are not entitled to assume that the District Court did not consider the facts which they contend are "economic reality."

Appellants United States and Interstate Commerce Commission allow the possibility that an owner may lease his tractor and also drive that tractor for the lessee. Appellant Regular Common Carrier Conference argues that owner-operators may never work for private carriers without being contract carriers. To this extent their respective theories of the case are in conflict.

Under the National Transportation Policy, neither the definition of contract carriage nor the definition of private carriage is entitled to a more liberal construction. A private carrier is included within the act and is not an exemption thereto.

Appellants United States and Interstate Commerce Commission have omitted many "economic realities" in this case. Oklahoma: has the risk of dead-heading equipment where back hauls of raw materials are not available; risk of improper loading and routing; risk of loss to cargo, public liability; pays for workmen's compensation; pays

for all administrative expense; pays employee's portion of social security and; owns all trailers and six of seventeen tractors.

In order to support the "economic reality" test the Appellants rely upon *United States* v. *Silk and Harrison* v. *Greyvan Lines, Inc.*, 331 U.S. 704. That case treats the scope of the word "employee" as defined in the Social Security Act of 1935. The Motor Carrier Act does not use the word "employee" in any material place. The requirement of employee driver was placed upon private carriers through Commission decisions and Commission rulings. That word should be held to mean precisely what the Commission intended it to mean, not more in this case only.

Harrison v. *Greyvan Lines, supra* is authority for the proposition that the Court should look to all facts and circumstances to determine whether this is contract or private carriage.

Because private carriage is defined by statute in terms of contract carriage, Appellants reason that whatever contract carriers do must by definition be excluded from private carriage. Appellants reserve to the Commission the right to state "normal indicia" of contract carriage and thereby reserve to the Commission the power to expand or contract the statutory definition of private carriage. The practical effect of this misconstruction of the Motor Carrier Act is to discount evidence of control, risk of loss to cargo, liability for tort and ownership of equipment by the carrier.

There is a Commission finding that Oklahoma's operation has been in good faith. Appellants have never contended that there is subterfuge involved in the arrangements. The substance complies with the form and Oklahoma is a private carrier and the drivers are its employees.

ARGUMENT

Initially, we would like to restate our position as contained in our brief to this Court on Motion to Dismiss or in the Alternative, Motion to Affirm. The District Court stated the question to be determined as follows:

> "The primary issue presented is whether the interstate transportation operations herein involved constitute private carriage conducted by the Company, or contract carriage on the part of the owner-operators. As the court in Lamb v. Interstate Commerce Commission, 10 Cir., 259 F.2d 358, put it, 'Simply stated it is who was transporting the goods in question,' that is, whose operations in interstate transportation were these, those of the Company or those of the owner operators?" (Tr. 17).

The District Court acknowledged the two tests of the Commission by restating them as follows:

> "* * * (1) Did anyone other than the Company have any right to control, direct and dominate the transportation involved, and (2) Were the owner-operators in substance engaged in the business of interstate or foreign transportation of property on the public highways for hire" (Tr. 20, 21).

In support of the first test the court cited: *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, D. Minn.,

78 F. Supp. 13; *Interstate Commerce Commission* v. *Gannoe*, W.D. Pa., 100 F. Supp. 790; *Motor Haulage Co.* v. *United States*, E.D. N.Y., 70 F. Supp. 17, *affirmed* 331 U.S. 784; *United States* v. *LaTuff Transfer Service*, D.Minn., 95 F. Supp. 375. In support of the second test the court cited: *Georgia Truck System, Inc.* v. *Interstate Commerce Commission*, 5th Cir., 123 F.2d 210; *Lamb* v. *Interstate Commerce Commission, supra*, in quotation; and *A. W. Stickle Co.* v. *Interstate Commerce Commission*, 10th Cir., 128 F.2d 155, *cert. den.* 317 U.S. 650.

The District Court pointed out that the Commission had used the decision *H. B. Church Truck Service Co., Common Carrier Application*, 27 M.C.C. 191, for its position but had in reality repudiated that decision in not obeying the following quotation from that case:

> "The Commission in that decision further stated:
>
> " 'The question as to who has the right to control and direct must be answered in the light of all the facts and circumstances surrounding the transaction between the carrier and shipper, and of the actual practices in the conduct of the operation thereunder. No element of such facts and circumstances is by itself controlling'." (Tr. 22.)

Based upon all the facts and circumstances of the operation and actual practices thereunder, including method of payment for equipment lease and wages for driving which were spelled out (Tr. 13, 14 and 15), the court concluded:

> "In the instant case both the form and the substance of the arrangements as revealed by the lease agreements, union contract and actual operations, clearly point to the fact that what is involved here

> is private carriage on the part of the Company, rather than transportation for-hire by the owner-operators." (Tr. 23).

As to the first Commission test, the court said:

> "The Company had the right to, and actually did control, direct and dominate the transportation of its products and the equipment and personnel concerned therewith." (Tr. 22).

As to the second Commission test, the court said:

> "The owner-operators were not in substance engaged in the business of transportation for-hire, but were merely employees of the Company and were so considered by both the Company and themselves." (Tr. 22).

THE THEORIES OF APPELLANTS UNITED STATES AND INTERSTATE COMMERCE AND APPELLANT REGULAR COMMON CARRIER CONFERENCE ARE IN BASIC CONFLICT

The Commission in its report sought to disqualify owner-operators from working for private carriers. No other result was possible in view of the Commission's conclusion that owner-operators always retained the right to defeat the required lessee control.[1] Appellants United States and Inter-

[1] That conclusion was: "There is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists" (Tr. 155). In referring to that quoted language, Commissioner Webb in his dissenting opinion said: "No one can fail to grasp the significance of this sweeping pronouncement. It means plainly and simply that no owner-operator can be employed by a common carrier, a contract carrier, or by a private carrier, if he rents and drives his own equipment unless, of course, he holds appropriate operating authority issued by the Commission" (Tr. 163, 164)

state Commerce Commission in their brief at page 16 now contradict the Commission's report by stating that of course an owner may lease his equipment to a private carrier and drive that equipment as an employee.

To the contrary, Appellant in Case No. 24, Regular Common Carrier Conference, argues that one who furnishes both instrumentalities of transportation (truck and driver) must be in substance engaged in transportation for-hire. That conclusion is argued in the Common Carrier's brief under the heading "The Mistaken Rationale of the Court Below" pages 11 to 15.

Plainly if the Common Carrier's position is the law, the District Court erred. However, that position is contrary to the Commission ruling in *Watson Manufacturing Co., Inc., Common Carrier Application*, 51 M.C.C. 223. As Commissioner Webb said in his dissenting opinion in the case at bar, such a rule would be "a legally unsupportable sentence of economic excommunication" (Tr. 165). The opinion of the District Court refutes the arguments of Regular Common Carrier Conference.

Appellants, United States and Interstate Commerce Commission, charge that the District Court erred in failing to construe the Motor Carrier Act in the light of its purpose which Appellants argue is "the ends to be fostered by economic regulation." The stated National Transportation Policy is set forth in the Historical Note preceding Title 49, U.S.C.A., Section 301.

The statutory definitions of contract and private carriers are as follows:

"(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph [14] of this section and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer." Title 49 U.S.C.A. 303(a)(15).

"(17) The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle,' who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise." Title 49 U.S.C.A. 303(a)(17).

Under the National Transportation Policy, neither definition is entitled to a more liberal construction. *Taylor* v. *Interstate Commerce Commission*, 209 F.2d 353. The definition of private carrier is not included under "Vehicles excepted from operation of law."

Appellants, United States and Interstate Commerce Commission, at page 12 of their brief argue that the engaging in transportation for-hire is the hallmark of both contract and common carriage. Consideration of whether the operation is common carriage may be dismissed because the goods of Oklahoma only, have been transported. (The

Commission compared this operation to contract carriage, Tr. 156.) Each private carrier is one person whose transportation serves a distinct need of that private carrier. Where the private carrier leases equipment, he has the exclusive use of the equipment for the continuing period of the lease. The question is whether the owner-operators furnish a for-hire transportation service to Oklahoma or whether Oklahoma furnishes a transportation service to itself. The question is as the District Court put it: "* * * whose operations in interstate transportation were these, those of the Company or those of the owner-operators?" (Tr. 17).

Appellants, United States and Interstate Commerce Commission, relate "economic reality" to economic regulation. He shall leave the burden of establishing that the National Transportation Policy may be reduced to "the ends to be fostered by economic regulation" to those appellants and pass on to a discussion of the "economic reality" of this case.

APPELLANTS HAVE NOT SHOWN ALL OF THE ECONOMIC REALITIES INVOLVED IN THIS OPERATION

On page twenty of their brief, Appellants, United States and Interstate Commerce Commission, state that the greatest economic hazard of private carriage is "dead-heading"—the necessity of returning a truck empty to the point of origin when backhauls of raw materials are unavailable or unneeded. We agree. Oklahoma bears this major hazard called "dead-heading." The lessor under each

lease is paid mileage rental both going and returning on a trip (Tr. 121). Where backhauls are involved the lessor receives an additional 3¢ per mile to compensate for additional fuel consumed and wear and tear on the leased equipment (Tr. 121). The driver is paid a total of 5¢ per mile going from Guthrie and returning to Guthrie. Where a backhaul is made, the driver is paid an additional 1¢ per mile on the backhaul bringing the total to 6¢ per mile (Tr. 143). Additional weight on the backhaul and additional time make his job more difficult and he should be paid an additional amount.

Oklahoma can sell its products more cheaply in areas where there is a likelihood of a backhaul of raw materials (Tr. 83, 84). This is one of the reasons Oklahoma sells its products priced on a zonal basis sometimes inversely related to the distance of the zone from Guthrie, Oklahoma (Tr. 83).

This leads to another major economic hazard of private carriage borne by Oklahoma—outbound movements. Scheduling, loading, and routing is done by Oklahoma. If an outbound movement is mistimed, a return of raw materials may be missed. Even if properly timed, selection of the wrong type of equipment (weight, dimension, etc.) for the outbound movement may preclude the return of the available raw materials. If the furniture is inefficiently loaded or improperly routed, Oklahoma suffers the waste. All of these risks are borne by Oklahoma and treated as expenses of production.

Oklahoma bears the complete risk of loss to goods damaged in transit. Where new furniture is being transported

uncrated, that risk is substantial. Oklahoma pays liability insurance and its assets constitute a fund for the payment of any judgment in excess of insurance limits. Oklahoma also pays for workmen's compensation insurance covering the employees in the loading and shipping department. Under Oklahoma law, awards under the Workmen's Compensation Act are against the employer first and insurance carrier second. Title 85, Section 11, Okla. Stat. 1951, as amended. Therefore, the assets of the corporation are a fund for the payment of awards should the insurance carrier be not able to respond. Oklahoma pays for all administrative expense. Oklahoma pays employer's portion of social security. Oklahoma owns outright all twenty-six trailers, six of seventeen tractors and the two bob-tails utilized in this operation.

Appellants' argument of risk of non-utilization of equipment or non-use of drivers is not impressive when it is considered the Commission examined four drivers, the Shipping Superintendent and the Vice-President of Oklahoma and failed to ask whether the situation had ever presented itself. We suggest that the economic reality to a driver who isn't receiving pay is the same regardless of whether (1) he is paid by the hour and has been laid off for lack of work, or (2) he is paid on a piece-work basis and there is no work. Power equipment such as tractors have a unit use life. They become worn out with use. If a tractor is not being used it is not creating expense and it is not wearing out. Payment of rental on units of use is the only fair method of payment. It is also to be noted that the

Commission did not ask any of the drivers whether there was a profit or loss experienced in the lease arrangement.

Appellants' contention that the owner-operators are engaged in transportation for-hire because they may make a profit or loss from the lease of equipment due to cost of fuel, oil and maintenance, was considered and overruled in the case of *Earle* v. *Bobbler*, 180 F.2d 1016.

In support of the "economic reality" test, Appellants rely upon the cases of *United States* v. *Silk* and *Harrison* v. *Greyvan Lines, Inc.*, 331 U.S. 704. Those cases, reported together, are concerned with whether persons are "employees" as defined under the Social Security Act of 1935. The word "employee" is not used in the Motor Carrier Act insofar as material to this case. The Interstate Commerce Commission made that status important in the case of *H. B. Church Truck Service Co., Common Carrier Application, supra*, as shown in the following quotation:

> "This presumption will, of course, yield to a showing that the shipper has the exclusive right and privilege of directing and controlling the transportation service, as, for example, if the equipment were operated by the shipper's employee." 27 MCC at 196.

The Commission also made the status important in the following ruling:

> "LEASING REGULATIONS
>
> "Ruling No. 103, November 23, 1956.
>
> "Section 207.1 Applicability.
>
> "Question: Do the regulations apply to the leasing of equipment to private carriers or shippers by a person not an authorized carrier?

> "Answer: No. The regulations have no application to such leasing arrangements. For such an arrangement to be proper the leased vehicle must be transferred to the shipper's possession and be operated under the shipper's complete direction and control by the shipper's own driver, with the shipper responsible to the public in case of accident and responsible to the Commission for compliance with the safety regulations. If this is not done, the arrangement would result in unlawful transportation for compensation by the owner of the vehicle. Authorized carriers may not lease vehicles to private carriers or shippers except under the conditions specified in 207.6 of the regulations."

The District Court found that Oklahoma had the right to and did actually control, direct and dominate (1) the transportation of its products and (2) the equipment concerned therewith, and (3) the personnel concerned therewith (Tr. 22). The District Court further found:

> "The owner-operators were not in substance engaged in the business of transportation for-hire, but were merely employees of the Company and were so considered by both the Company and themselves" (Tr. 22).

If the Commission requires that the driver be an employee so that the private carrier will have direction, control, and domination over the transportation, that requirement has been satisfied. It is plain that the Commission is attempting in this case to add the requirement that the driver or owner-operator divest himself of all risk and be paid only on a fixed salary or by the hour for his driving and an amount certain for rental of equipment. The Motor Carrier Act makes no such requirement. At any rate, the District Court

found that these owner-operators were employees and not engaged in the business of transportation for-hire.

It is interesting to note that in this case Appellants argue that direction, control and domination of the transportation service does not answer a second test of economic risks and burdens. In the case of *Machinery Haulers Association, et al.* v. *Agricultural Commodity Service*, No. MC-C-2488, — M.C.C. —, decided May 3, 1961, the Commission, Division 1, held that the driver of a vehicle operated on behalf of a farm cooperative must not retain any "interests." Specifically, Division 1, held:

> "In Summary, we conclude that, in order for the motor vehicles to be controlled and operated by a cooperative association within the meaning of the partial exemption of section 203(b)(5):
>
> (1) The motor vehicle either must be owned by the cooperative association, or it must be used and operated by such association as if it were, in fact, owned by the cooperative; and
>
> (2) The driver of the vehicle must be a bona fide employee of the cooperative association, and must possess no duties, obligations, responsibilities or interests inconsistent with its obligations to that association." (MC-C-2488 at page 38.)

Title 49, U.S.C.A., Sec. 303(b), provides:

> "Vehicles excepted from operation of law
>
> (b) Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equip-

> ment shall be construed to include * * * (5) motor vehicles *controlled and operated* by a cooperative association as defined in the agricultural Marketing Act, as amended, or by a federation of such cooperative association, if such federation possesses no greater powers or purposes than cooperative associations so defined; * * *." (Emphasis supplied.)

In the *Machinery Haulers Association* decision, *supra*, the Commission holds that "controlled and operated" embraces financial interests. In the case at bar, Appellants contend that a finding of control, direction and domination does not embrace these financial interests.

If Appellants cite the case of *Harrison* v. *Greyvan Lines, Inc., supra,* to overthrow the District Court's finding that the drivers are employees, we point out the following distinctions between that case and the one at bar: In the *Harrison* case the owner-operators worked under contracts whereby they furnished all equipment and were paid between 50 and 52 per cent of Greyvan's "tariff." In the case at bar the lessors lease only part of the needed equipment to Oklahoma and are paid a rental, not a percentage of the profit Oklahoma makes (if any) on the transportation. The owner-operators in the *Harrison* case were free to seek freight and their efforts in that regard produced income to them. The drivers in the case at bar are not free to seek freight, but are assigned to drive particular shipments by Oklahoma. Also, in the case at bar, Oklahoma retains the right to hire and fire drivers without regard to the lease agreement. Presumably in the *Harrison* case, the driver and equipment came together with the contract. In the *Harrison*

case there was a manual purporting to instruct the owner-operators as to their conduct in the performance of their duties which manual was not followed. In the case at bar, Appellants admit that Oklahoma has and exercises this control. Additionally, in the *Harrison* case, *supra*, the owner-operators could hire employees. In the case at bar, the drivers are themselves employees and cannot hire employees. In the case at bar there is no subterfuge. The lease agreement is strictly followed. Oklahoma furnishes the tractor to the driver, not vice-versa.

In the *Harrison* case, *supra*, this Court pointed out:

> "The Social Security Agency and the Courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete." 331 U.S. at 716.

The appellants, United States and Interstate Commerce Commission, do not seek a determination based upon all the facts and circumstances. In that respect, *Harrison* v. *Greyvan Lines, Inc., supra*, is authority against the contention of those appellants.

APPELLANTS UNITED STATES AND INTERSTATE COMMERCE COMMISSION MISCONSTRUE THE MOTOR CARRIER ACT

Appellants, United States and Interstate Commerce Commission, state at page 16 of their brief, that the definition of private carriage:

> " 'applies only to the extent to which § 204(a)(15) (the contract carrier definition) does not.' Shenley Corporation v. United States, 326 U.S. 432, 436."

We agree with that statement, but not with the use the Appellants make of it. That use is set forth also on page 16 of the brief. Appellants state that because private carriage is defined in terms of contract carriage, the Commission must first determine the extent to which the operation is characterized by the *normal indicia* of contract carriage. Appellants cite *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, for the proposition that a court cannot reverse the Commission's decision on the meaning of a broad statutory term where the Commission's ultimate conclusion has support in the record.

The distinction between the *N.L.R.B.* v. *Hearst Publications* case, *supra*, and the one at bar is that in the *Hearst Publications* case Congress left the determination of the meaning of "employee" as used in the National Labor Relations Act to the N.L.R.B. In the case at bar, Congress did not leave the determination of the meaning of contract carrier or private carrier to the Commission. Congress defined both terms. See *Contract Steel Carriers* v. *United States*, 128 F. Supp. 25, *affirmed, United States* v. *Contract Steel Carriers, Inc.*, 350 U.S. 409. The Commission in the report and the Appellants now attempt to graft "normal indicia" onto the statutory definition of contract carrier. Because a private carrier is what a contract carrier by statute is not, the Commission in the report and Appellants in their brief reason that whatever contract carriers do may not be considered as an element of private carriage.

Illustrations are as follows: (1) Appellants attempt to reduce the finding of direction, control and domination of the transportation, the equipment and the personnel, to supervision over the drivers in the details of hauling. The "control" as reduced (See footnote 8 in brief of Appellants U.S. and ICC) is compared to contract carrier situations where the contract carrier allows the shipper to supervise his (the contract carrier's) drivers (Tr. 157). (2) The Commission labeled Oklahoma's ownership of all twenty-six trailers contract carriage by the "truckaway method." (Tr. 156, see footnote No. 5 to the report.) (3) The Commission refused to consider that Oklahoma had risk of loss and damage to the cargo because there is no requirement in the Motor Carrier Act that contract carriers provide such protection (Tr. 157). (4) In a footnote, the Commission called Oklahoma's obligation to provide a paid vacation for the drivers as provided in the union contract, deferred compensation. (5) The Commission refused to consider that Oklahoma had risk of public liability for negligence because that risk could be passed on to insurers and was little more or less than a rate adjustment (Tr. 157). There was no evidence of a relationship between the premiums paid and any "rate". Insurance policies have amount and coverage limitations. Policies of insurance are partial protection only; the risk is the question.

The Commission committed other errors in considering its second test. The Commission held that Oklahoma's requiring physicians' certificates on drivers, reports on vehicle condition and drivers' logs, pursuant to Commission safety regulations, was of no importance in deter-

mining the person responsible for getting and keeping those items (Tr. 160). However, the Commission supposes itself to have some control over men and equipment by virtue of requiring these reports. Oklahoma also controls drivers and equipment through these reports. The Commission never considered these requirements when discussing control.

The Commission thus compared each aspect of this operation to what some contract carriers do. The Commission never considered all aspects at one time to ask if there was a contract carrier anywhere with such few attributes of transportation service. Commissioner Webb in his dissenting opinion at Tr. 162 stated:

> "It is highly unlikely that there is any carrier in the United States whose connection with the prime attributes of transportation service is as tenuous as that of the respondents."

The Commission in its report and the Appellants in this case attempt to amend the statutory definition of private carrier at will.

THERE IS NO SUBTERFUGE INVOLVED IN THIS OPERATION

Appellants have never contended that Oklahoma or the drivers are involved in a subterfuge arrangement. The Commission in its report recognized that the operation was being carried out in good faith by Oklahoma in an attempt to conform to true private carriage (Tr. 160). The absence of subterfuge is a major distinction between the case at

bar and the following authority relied upon by Appellants: *A. W. Stickle Co.* v. *Interstate Commerce Commission*, 128 F.2d 155 (C.A. 10); *Georgia Truck System* v. *Interstate Commerce Commission*, 123 F.2d 210 (C.A. 5); *Interstate Commerce Commission* v. *Gannoe*, 100 F. Supp. 790 (W.D. Pa.); *United States* v. *La Tuff Transfer Service*, 95 F. Supp. 375 (D. Minn.); *Interstate Commerce Commission* v. *Isner*, 92 F. Supp. 582 (E.D. Mich.).

The case of *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, 78 F. Supp. 13 (D. Minn.), is distinguishable on each of the ten essential facts stated at 78 F. Supp. 19, which facts convinced that court that transportation for-hire was being performed.

The lease of equipment is proper and does not result in transportation for-hire. *Motor Haulage Co., Inc.* v. *United States, et al.*, 70 F. Supp. 17, *affirmed*, 331 U.S. 784; *U-Drive It Company* v. *Pennsylvania Inc., Common Carrier Application*, 23 M.C.C. 799). The use of the owner of the tractor as a driver is proper. *Earle* v. *Babler, supra; Watson Manufacturing Co., Inc., Common Carrier Application, supra; Van Meter* v. *PUCO* (Ohio), 165 O.S. 391, 135 N.E.2d 848.

Each of the last cited three cases is exactly in point. If an owner-operator leasing equipment and driving for a fully regulated carrier under Commission rules is an employee and not a contract carrier, then certainly the drivers in this case must also be employees and not eleven different and distinct contract carriers. Compare *American Trucking Assos.* v. *United States*, 344 U.S. 298; *Local 24 of I. B. of T., C., W. & H. of America* v. *Oliver, et al.*, 358 U.S. 283.

CONCLUSION

We respectfully submit that the decision of the District Court of the United States for the Western District of Oklahoma, entered in this cause should be affirmed.

Respectfully submitted,

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